

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PEGGY FORAKER,

3:14-cv-00087-BR

Plaintiff,

OPINION AND ORDER

v.

USAA CASUALTY INSURANCE
COMPANY,

Defendant.

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BROWN, Judge.

This matter comes before the Court on Defendant USAA Casualty Insurance Company's Motion (#274) for Summary Judgment as to Plaintiff's First Cause of Action for Breach of Contract and Plaintiff Peggy Foraker's Motion (#283) for Partial Summary Judgment on Breach of Contract, Attorney Fees, Expert Costs, and Prejudgment Interest, including for partial final judgment on Claim One pursuant to Federal Rule of Civil Procedure 54(b).

For the reasons that follow, the Court **GRANTS** Defendant's Motion (#274) for Summary Judgment as to Plaintiff's First Cause of Action for Breach of Contract and **DENIES** Plaintiff's Motion (#283) for Partial Summary Judgment on Breach of Contract, Attorney Fees, Expert Costs, and Prejudgment Interest.

BACKGROUND

The following facts are undisputed and taken from the record on summary judgment:¹

I. Factual Background

Plaintiff was injured in a two-car automobile collision on January 4, 2012, when Plaintiff's car was struck by the car that Adrian Neira, an uninsured motorist, was driving. At the time of the collision Neira was fleeing police and driving the wrong way down a one-way street.

Defendant insured Plaintiff and her automobile under an insurance policy that provided \$50,000 in "Additional Personal Injury Protection" (PIP), \$100,000 on Medical Payments (MedPay), and \$1,000,000 in Uninsured Motorist (UM) benefits. As noted, Neira was uninsured.

On January 5, 2012, Plaintiff reported the accident to Defendant and made PIP and MedPay claims. Plaintiff later made a UM claim. Defendant accepted coverage under PIP and MedPay and between February 6, 2012, and February 20, 2013, Defendant paid

¹ In her Opposition (#289) to Defendant's Motion for Summary Judgment Plaintiff moves to strike various exhibits and factual materials filed by Defendant on summary judgment on the basis that those materials are not relevant to the legal analysis as to Claim One. The mere fact that portions of the summary-judgment record may not be material to the ultimate legal analysis, however, is not a basis to strike those materials from the record. Instead the Court disregards or gives little weight to such material as described herein. Accordingly, the Court denies Plaintiff's Motion to Strike presented in her Opposition to Defendant's Motion for Summary Judgment.

\$159,329.76 to Plaintiff for covered medical expenses under the PIP and MedPay portions of the policy. On February 20, 2013, Defendant advised Plaintiff and her medical providers that Defendant's payments exhausted the limits of Plaintiff's MedPay and PIP coverages.

On April 8, 2013, Plaintiff made a policy-limits demand for \$1,000,000.00, the full amount of the UM coverage, and the parties engaged in extensive negotiations regarding the UM claim. On May 30, 2013, the parties agreed to an open extension of the time limit by which Defendant was required to respond to Plaintiff's policy-limits demand for UM coverage.

On November 14, 2013, Defendant offered to resolve Plaintiff's UM claim by paying \$250,000.00, but Plaintiff did not accept this offer. As noted below, Plaintiff initiated this litigation approximately four weeks later.

II. Procedural Background

Plaintiff filed this action in Multnomah County Circuit Court on December 16, 2013, and Defendant removed it to this Court on January 16, 2014.

In her original Complaint, Plaintiff asserted three claims against Defendant: Plaintiff alleges Defendant breached the insurance contract by refusing to make payments under the UM coverage (Claim One); Plaintiff alleges Defendant's refusal to pay UM benefits violated the Elderly Persons and Person with

Disabilities Abuse Prevention Act, Oregon Revised Statutes § 124.005, et seq. (Claim Two); and Plaintiff alleges Defendant's actions in denying benefits under the UM coverage breached Defendant's contractual implied covenant of good faith and fair dealing (Claim Three).

On April 23, 2014, the Court dismissed without prejudice Claim Two as premature and with leave to amend if and when the amount of money that Defendant owes to Plaintiff is actually determined. On August 28, 2014, the Court bifurcated the proceedings to allow the parties to litigate Plaintiff's Claim One to conclusion before litigating Claim Three.

After an eight-day bench trial the Court found the negligence of Neira, the uninsured driver of the other vehicle, caused Plaintiff personal injuries. In particular, the Court found Plaintiff incurred economic damages in the amount of \$1,172,338.04 and noneconomic damages in the amount of \$750,000.00 as a result of Neira's negligence. On February 19, 2016, Defendant paid to Plaintiff the \$1,000,000.00 UM policy limit.

STANDARD

Summary judgment is appropriate when there is not a "genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving

party must show the absence of a genuine dispute of a material fact. *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir. 2005). See also *Emeldi v. Univ. of Or.*, 673 F.3d 1218, 1223 (9th Cir. 2012). In response to a properly-supported motion for summary judgment, the nonmoving party must go beyond the pleadings and point to "specific facts demonstrating the existence of general issues for trial." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). "This burden is not a light one The non-moving party must do more than show there is some 'metaphysical doubt' as to the material facts at issue." *Id.* (citation omitted).

A dispute as to a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Nigro v. Sears, Roebuck & Co.*, 784 F.3d 495, 497 (9th Cir. 2015) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The court must draw all reasonable inferences in favor of the nonmoving party. *Sluimer v. Verity, Inc.*, 606 F.3d 584, 587 (9th Cir. 2010). "If conflicting inferences may be drawn from the facts, the case must go to the jury" and summary judgment cannot be granted. *Torres v. City of Los Angeles*, 548 F.3d 1197, 1206 (9th Cir. 2008) (quoting *LaLonde v. County of Riverside*, 204 F.3d 947, 959 (9th Cir. 2000)).

A "mere disagreement or bald assertion" that a genuine dispute as to a material fact exists "will not preclude the grant

of summary judgment." *Deering v. Lassen Cmty. Coll. Dist.*, No. 2:07-CV-1521-JAM-DAD, 2011 WL 202797, at *2 (E.D. Cal., Jan. 20, 2011) (citing *Harper v. Wallingford*, 877 F.2d 728, 731 (9th Cir. 1989)). See also *Moore v. Potter*, 701 F. Supp. 2d 1171 (D. Or. 2010). When the nonmoving party's claims are factually implausible, that party must "come forward with more persuasive evidence than otherwise would be necessary." *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1137 (9th Cir. 2009) (citing *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1149 (9th Cir. 1998)).

The substantive law governing a claim or a defense determines whether a fact is material. *Miller v. Glenn Miller Prod., Inc.*, 454 F.3d 975, 987 (9th Cir. 2006). If the resolution of a factual dispute would not affect the outcome of the claim, the court may grant summary judgment. *Id.*

DISCUSSION

As noted, the parties have filed Cross-Motions for Summary Judgment on Claim One in which they each contend the Court must issue summary judgment in their favor as a result of the Court's Verdict (#237).

Defendant asserts the undisputed factual record requires the Court to find Defendant did not breach the insurance contract because Defendant did not deny Plaintiff's UM claim and because it paid the \$1,000,000.00 policy limit shortly after the Court

determined Plaintiff suffered damages in excess of that limit. In addition, Defendant contends because the insurance contract specifically contemplated the adjudication of any disagreement between the insurer and the insured regarding the amount of damages and because the parties' disagreement about the nature and extent of Plaintiff's damages was not resolved until the Court returned its Verdict, Defendant did not breach the contract when it waited until after the Court's Verdict to pay the full amount of the policy limit. Defendant, therefore, contends it did not breach the insurance contract and, therefore, it is entitled to summary judgment on Claim One.

Plaintiff, on the other hand, contends Defendant's failure to accept Plaintiff's UM claim and to pay the \$1,000,000.00 policy limit before Plaintiff filed this action constitutes a breach of the insurance contract. As a result, Plaintiff contends she is entitled to summary judgment on Claim One; a declaration that Defendant breached the insurance contract; prejudgment interest in the amount of \$258,169.26, plus \$63.65 per day from February 19, 2016; attorneys' fees pursuant to Oregon Revised Statute § 742.061; and an award of expert costs. Plaintiff also seeks a partial, "final" judgment on Claim One pursuant to Federal Rule of Civil Procedure 54(b).

I. Breach-of-Contract Claim

The UM policy provides Defendant:

will pay compensatory damages which [Plaintiff] is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of:

1. Bodily injury sustained by [Plaintiff] and caused by an auto accident; and
2. [Property damage] caused by an accident if the Declarations indicates that [property damage] UM Coverage applies.

Statement of Agreed Material Facts (#272), Ex. A at 24. The only portion of the UM policy that relates to resolving disagreements among the parties as to UM coverage or the amount of damages provides:

If [Defendant] and [Plaintiff] disagree as to:

1. Whether the covered person is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle; or
2. The amount of damages that the covered person is legally entitled to collect from that owner;

then, that disagreement may be arbitrated, provided both parties so agree to the arbitration and agree to be bound by the results of the arbitration. However, disagreements concerning coverage under this Part may not be arbitrated.

Statement of Agreed Material Facts (#272), Ex. A at 26.

"[U]nder well-established principles of contract law, a contract action cannot be maintained . . . until the contract has been breached." *Vega v. Farmers Ins. Co. of Oregon*, 323 Or. 291, 296 (1996). An insurer breaches the insurance contract "when the insurer denies a claim for UM/UIM benefits, thereby refusing to honor a promise to pay such benefits." *Id.* See also *Pritchard*

v. Regence Bluecross Blueshield of Oregon, 225 Or. App. 455, 460 (2009). As noted, the UM policy in this case imparts on Defendant the duty to pay Plaintiff's UM claim in the event Plaintiff would be entitled to recover from an uninsured motorist compensatory damages caused by an automobile accident. Thus, under *Vega* if Defendant breached its duty to pay Plaintiff's UM claim as she asserts, that breach could only occur when Defendant denied Plaintiff's UM claim in whole or in part.

As noted, it is undisputed that on May 30, 2013, the parties agreed to an open extension of time in which Defendant was required to respond to Plaintiff's policy-limits demand for UM coverage. It is also undisputed that on November 14, 2013, Defendant offered to resolve Plaintiff's UM claim by paying \$250,000.00, but Plaintiff did not accept that offer and instead filed this action on December 16, 2013. Moreover, the parties did not invoke the arbitration provision in the UM policy.

Plaintiff, however, does not point to any portion of the record that establishes either as a matter of undisputed fact or creates a genuine issue of material fact as to whether Defendant actually denied Plaintiff's UM claim in whole or in part in violation of the policy terms. Instead the record indicates Plaintiff and Defendant were actively engaged in negotiating Plaintiff's UM claim from April 8, 2013, until December 16, 2013, when Plaintiff filed this action. In particular, because

Plaintiff and Defendant agreed to an open-ended extension of time for Defendant to respond to Plaintiff's policy-limits UM demand, Plaintiff fails to establish as a matter of fact or law that Defendant denied her UM policy-limits claim when it failed to pay the policy limit before Plaintiff filed this action. Instead, by filing this action in December 2013, the Court concludes Plaintiff effectively short-circuited the claims process before the expiration of the open-ended time extension for Defendant to state a final position on Plaintiff's policy-limits demand for UM coverage.

In its February 3, 2016, Verdict, the Court resolved the disputed issues arising from the unresolved claims in that process by finding the damages caused by Neira exceeded the policy limit. That Verdict, however, did not establish any breach of the insurance contract. Accordingly, although the parties now agree Defendant was required to pay the full limit of the UM claim upon receiving the Court's Verdict, Defendant did not breach the contract because it did not deny Plaintiff's UM claim in whole or part and because Defendant has now paid the \$1,000,000.00 UM policy limit.

On this record, therefore, the Court grants Defendant's Motion for Summary Judgment as to liability on Claim One and denies Plaintiff's Motion for Summary Judgment as to liability on Claim One. For the same reasons, the Court denies Plaintiff's

request for a partial final judgment as to Claim One under Rule 54(b).

II. Prejudgment Interest

Plaintiff moves for an order granting prejudgment interest in the amount of \$258,169.26, plus \$63.65 per day from February 19, 2016. Defendant, on the other hand, contends Plaintiff is not entitled to prejudgment interest because Defendant did not breach the contract; the insurance policy does not provide for the payment of any prejudgment interest; and, in any event, prejudgment interest is inappropriate under Oregon law because the exact amount and the time from which interest would accrue are not "ascertained or easily ascertainable." See, e.g., *Precision Seed Cleaners v. Country Mut. Ins. Co.*, 976 F. Supp. 2d 1228, 1257 (D. Or. 2013) (citing *Farhang v. Kariminaser*, 230 Or. App. 554, 556 (2009)).

Plaintiff is not entitled to prejudgment interest under the breach-of-contract theory underlying Plaintiff's Claim One because, as noted, the Court has determined Defendant is entitled to summary judgment as to Claim One. In any event, there is not any authority in the UM policy that authorizes an award of prejudgment interest when the Court has granted summary judgment as to Claim One in favor of Defendant.

Accordingly, on this record the Court concludes Plaintiff is not entitled to prejudgment interest as to Claim One.

III. Attorneys' Fees

The parties agree Plaintiff is entitled to attorneys' fees pursuant to Oregon Revised Statute § 742.061. The parties disagree, however, regarding the extent of attorney services for which Plaintiff may recover attorneys' fees under § 742.061 for her Claim One.

The Court concludes the parties' dispute in this respect is premature. Although the parties are correct that attorneys' fees pursuant to § 742.061 apply only to the litigation of Claim One, the Court concludes the issue of attorneys' fees as to Claim One is likely to overlap with similar issues in the event that Plaintiff prevails on the remaining claims. The Court, therefore, concludes Plaintiff's current claim for attorneys' fees should be resolved in the ordinary course after entry of a final judgment that resolves all of the issues in this litigation.

IV. Expert-Witness Fees

In a Request for Admissions Plaintiff requested Defendant admit the automobile accident that gave rise to this case caused 41 different medical conditions. Plaintiff moves for expert-witness fees under Federal Rule of Civil Procedure 37(c)(2) on the basis that Defendant's failure to admit any medical conditions were caused by the automobile accident required Plaintiff to call expert witnesses at trial in order to establish

causation.

Rule 37(c)(2) provides:

(2) Failure to Admit. If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

- (A) the request was held objectionable under Rule 36(a);
- (B) the admission sought was of no substantial importance;
- (C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or
- (D) there was other good reason for the failure to admit.

At trial the Court heard a significant amount of contested medical testimony from both sides regarding the many medical conditions that Plaintiff alleged were caused by the automobile accident, including significant disputed evidence as to a hydrocephalus condition that caused the majority of Plaintiff's damages and a cervical-spine injury that required significant treatment, including surgery. Indeed, of the \$372,338.04 that the Court found Plaintiff incurred in past medical expenses, \$307,600.20 were incurred to treat Plaintiff's hydrocephalus and cervical-spine injury.

Although the Court ultimately concluded Plaintiff had proven causation and damages in the amounts included in the Verdict,

that finding was made only by a preponderance of the evidence and in the face of credible evidence to the contrary presented by Defendant. In fact, the Court noted at the end of trial:

Literally, this record is capable of variety of factual conclusions; none of which could be overturned by an appellate court because there is factual support for the theories both sides are advancing. I'm not saying that as a threat or as an incentive but an observation.

Tr. of Proceedings (#262) at 12. Thus, as to Plaintiff's hydrocephalus and cervical-spine injury, the Court concludes Defendant "had a reasonable ground to believe that it might prevail on the matter." See Fed. R. Civ. P. 37(c)(2)(C).

To the extent that Plaintiff seeks expert-witness fees as a result of Defendant's refusal to admit the accident caused the other 39 conditions, the Court declines to issue such fees because the vast majority (if not all) of the expert testimony at trial related to Plaintiff's hydrocephalus and cervical-spine injury and, therefore, "the admission[s] sought was of no substantial importance." See Fed. R. Civ. P. 37(c)(2)(B).

Accordingly, on this record the Court denies Plaintiff's request for expert-witness fees.

CONCLUSION

For these reasons, the Court **GRANTS** Defendant's Motion (#274) for Summary Judgment as to Plaintiff's First Cause of Action for Breach of Contract; **DENIES** Plaintiff's Motion (#283)

for Partial Summary Judgment on Breach of Contract, Attorney Fees, Expert Costs, and Prejudgment Interest; and **DENIES** Plaintiff's request for a partial final judgment on Claim One pursuant to Federal Rule of Civil Procedure 54(b).

IT IS SO ORDERED.

DATED this 14th day of October, 2016.

A handwritten signature in black ink, appearing to read "Anna J. Brown", is written over a horizontal line.

ANNA J. BROWN
United States District Judge